

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1346

To be argued by
JO ANN HARRIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1346

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN DAVID HUGHEY, III,

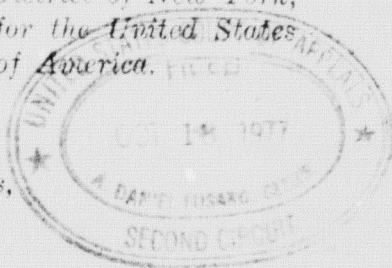
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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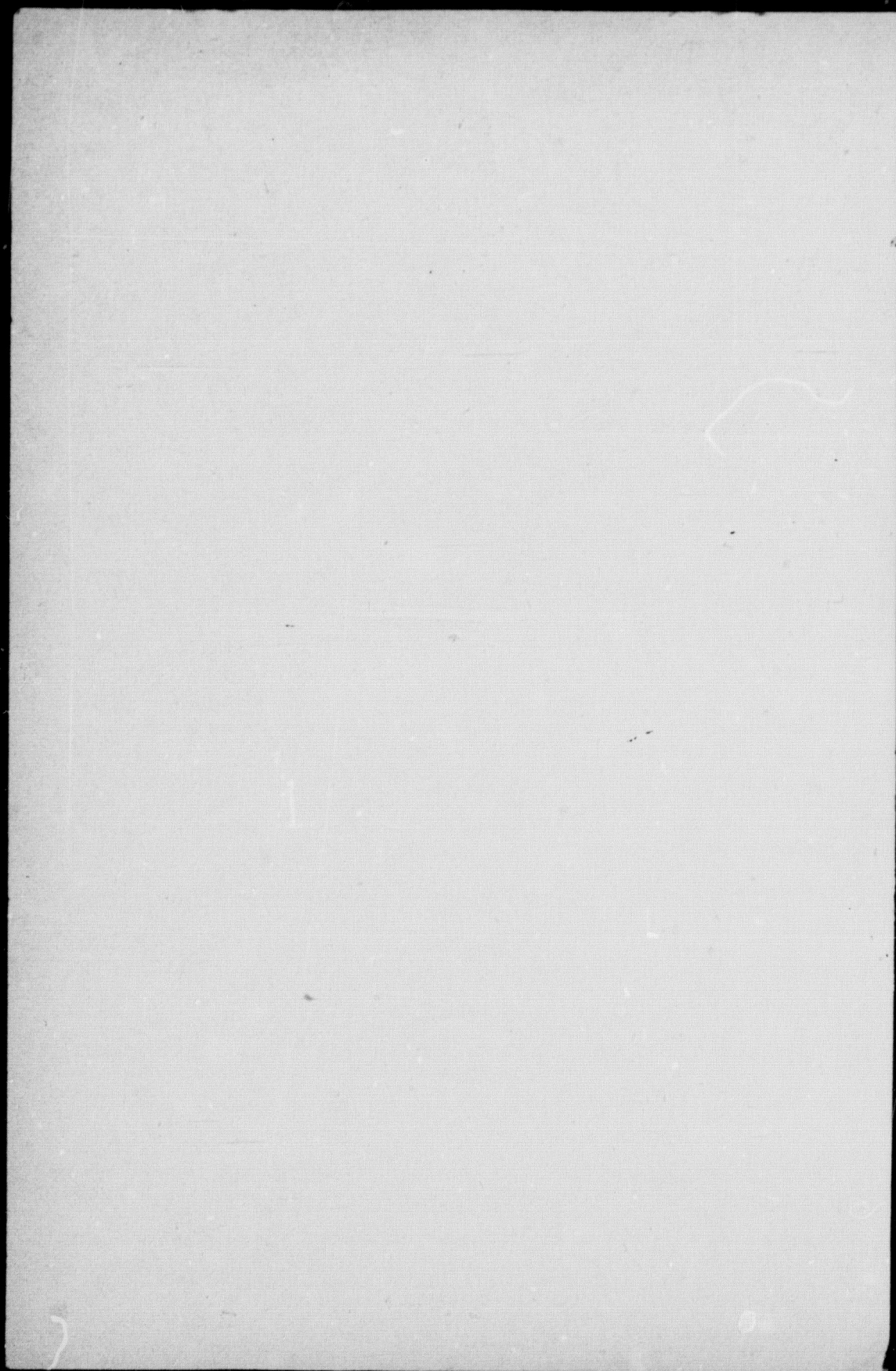


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1346

UNITED STATES OF AMERICA,

Appellee,

—V.—

JOHN DAVID HUGHEY, III,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John David Hughey, III, appeals from an order by the Honorable Thomas P. Griesa, United States District Judge, entered in the United States District Court for the Southern District of New York on July 22, 1977, denying his motion to dismiss an Indictment on the ground of an alleged violation of the Double Jeopardy Clause of the Fifth Amendment.

Indictment 76 Cr. 496, filed on May 21, 1976, charges Hughey in one count with criminal contempt, in violation of Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure, in connection with his refusal to testify at the trial of *United States v. Swinton*, 70 Cr. 230 (MP), on September 22, 1975, after a grant of immunity.

On August 6, 1976, Hughey moved to dismiss the present Indictment alleging that a prior contempt judgment entered during the Swinton trial on September 22, 1975, amounted to a sentence for criminal contempt and therefore that this Indictment placed him twice in jeopardy. Judge Griesa denied this motion in an oral opinion and order rendered and entered on July 22, 1977. Thereafter, Hughey immediately took this appeal, prior to trial, in accordance with the authority set forth in *Abney v. United States*, 97 S. Ct. 2034 (June 9, 1977). No trial date has been set by the District Court pending this appeal.

Statement of Facts

A. Events preceding Hughey's appearance as a witness in the trial of *United States v. Swinton*, 70 Cr. 230 (MP)

Indictment 70 Cr. 230 (MP) arose out of a series of bombings in New York City during the fall of 1969. (GX 1).^{*} That indictment named as defendants Hughey, Samuel Melville, Jane Alpert, Jonathan Grell and Patricia Swinton. Hughey, Alpert, Melville and Grell were arrested in connection with these charges on November 12, 1969. Swinton evaded arrest and became a fugitive.

On May 4, 1970, Hughey, along with Alpert, pleaded guilty to Count One, the conspiracy count, of Indictment 70 Cr. 230.^{**} Alpert then fled and became a fugitive.

^{*} Citations preceded by "GX" are to Exhibits appended to the Government's Affidavit in Opposition to Hughey's motion, dated August 31, 1976, and filed September 1, 1976. Citations preceded by "A" are to defendant's Appendix on this appeal.

^{**} Melville also pleaded guilty to these federal charges and to New York State charges, arising out of the same incidents. He was sentenced in state court and later died in the uprising at Attica State Prison in September, 1971. Grell was not prosecuted and an Order of Nolle Prosequi was entered with respect to him on March 2, 1971.

Hughey was sentenced on September 30, 1970, to an indeterminate term of imprisonment as a Young Adult Offender. He was released from prison on June 14, 1972, and on August 20, 1974, his conviction was set aside, pursuant to Title 18, United States Code, Section 5021, as extended by Section 4209.

Thereafter, Indictment 70 Cr. 230, long dormant in light of the fugitive status of both Alpert and Swinton, again became active. First, Alpert surrendered on November 14, 1974, and after pleading guilty to a second Indictment, 70 Cr. 372 (MP) which charged her with bail jumping, she was sentenced on January 13, 1975, by the Hon. Milton Pollack, to a prison term of 18 months on the bombing indictment and a consecutive term of nine months on the bail jumping indictment.

Second, shortly after Alpert's incarceration, Swinton was apprehended in Vermont on March 13, 1975.*

In anticipation of Swinton's forthcoming trial, on March 20, 1975, Hughey, his attorney Martin Stolar, Esq., an FBI Agent and David A. Cutner, the Assistant United States Attorney in charge of the prosecution of Swinton on Indictment 70 Cr. 230, met in Cutner's office. At that meeting the Government made clear its intention to call Hughey as a witness in the Swinton trial; Hughey,

* Contrary to speculation in the press at the time, neither Hughey nor Alpert had anything to do with the capture of Swinton. Both were interviewed by the FBI after Alpert's surrender; both claimed to know nothing of Swinton's whereabouts after her disappearance in the fall of 1969. Alpert's disclaimer was later shown to have been false, when Swinton's attorney revealed that the two women had traveled and lived together during part of their time underground.

in turn, made it apparent that he was reluctant to provide any information, even with a grant of immunity.*

The Government, faced with the threatened recalcitrance of the only living confessed co-conspirators,** moved on May 12, 1975, for a hearing, well in advance of trial, to determine whether or not Hughey and Alpert would change their positions if confronted with incarceration designed to coerce their testimony. (GX 2).*** Counsel for Swinton, Hughey and Alpert, however, opposed this request and the Government subsequently withdrew its motion on June 6, 1975. Immediately thereafter Judge Pollack scheduled the Swinton trial to commence on September 22, 1975.

B. Hughey's appearance as a witness in the trial of *United States v. Swinton*

Hughey was duly subpoenaed by the Government as a witness in the Swinton trial and called to the witness stand twice on September 22, 1975. (A1-15). The

* Similarly, after Swinton's capture, Alpert was interviewed with her attorney Michael Armstrong, Esq. on March 24, 1975. She said she was fully prepared to incur a contempt citation if called to testify in the trial of Swinton.

** Swinton was named in the same conspiracy count to which both Hughey and Alpert had pleaded guilty.

*** The request for an early hearing was premised on the Government's concern that if the hearing was delayed until trial, the projected short duration of that proceeding would not provide exposure to confinement sufficient to compel testimony. The result the Government feared would be either the loss of two critical witnesses, or a serious disruption in the court's schedule, while the trial was adjourned for "a reasonable time" to see if confinement for contempt would compel Hughey and Alpert to testify. The Government was relying upon Rule 5(c) (i) of the then effective District Court Plan for Achieving Prompt Disposition of Criminal Cases. The Government's position was expressly communicated to the attorney for each witness in a memorandum of law which was served with the moving papers.

first occasion was just prior to the selection of the jury. At that time, he was sworn, granted immunity, pursuant to Title 18, United States Code, Section 6001 et seq., and directed by Judge Pollack to give testimony as to all matters about which he would be interrogated before the court in the trial of Indictment 70 Cr. 230. (GX 3).

Only after the trial judge assured that Hughey understood the nature of the proceedings on September 22, 1975,* did questioning commence by the Assistant United States Attorney. Upon Hughey's initial refusal to answer, the District Court, tracking the language of the *civil* contempt statute, Title 28, United States Code, Section 1826(a), called his attention to the fact that "... [I] may summarily order you into confinement in *civil* contempt as a witness who refuses *without just cause to testify* . . ." (emphasis added). (A7). Judge Pollack then cautioned Hughey that, in addition to civil contempt, his refusal to comply with the court's order might result in a future criminal prosecution.** At this juncture, the

* First, Hughey was given a copy of the Immunity Application and Order. (A 2). Then, Judge Pollack addressed Hughey's attorney and said (A 6):

"... I will ask Mr. Stolar to advise the witness of the legal and factual significance of the legal proceedings which have just been taking place so that he is amply aware of the situation."

The proceedings then were halted to provide time for Hughey and his attorney to confer. After that pause, the court asked Hughey (A 6):

"Have you had ample opportunity to be advised by your counsel, Mr. Hughey?"

Hughey responded:

"Yes, I have."

** Judge Pollack advised Hughey:

"I further wish to call to your attention the fact that an obstruction of justice if clamied by the Government to arise from your refusal and failure to testify at a trial may result in the prosecution of a criminal contempt charge." (A 7).

proceedings were suspended to allow Hughey to consult further with his attorney and to contemplate the course of action he would pursue.

When the proceedings resumed later the same day, after the jury had been sworn, Hughey took the witness stand, out of the presence of the jury, and again was carefully advised of the available sanctions if he refused to testify as directed. Judge Pollack advised Hughey that he faced not only "civil contempt" but "possibly also criminal contempt", and further explained the significantly different penalties that attended each sanction.* Hughey was given a further opportunity to confer with counsel and to clarify with the trial court any questions or misconceptions in his own mind.** When neither Hughey nor his attorney expressed any confusion or question, Judge Pollack directed the Government to examine Hughey on the witness stand.

Hughey then refused to answer questions, at which point Judge Pollack, tracking the *civil* contempt statute, directed Hughey "to make a response to that question, finding that your refusal is *without just cause*" (emphasis

* Thus, Judge Pollack told Hughey:

"that for a *civil* contempt you may be committed to the custody of the Attorney General or his authorized representative for the *duration of the trial* . . ." (emphasis added).

* * * * *

"that for a criminal contempt you may be committed for a period of up to 18 months in prison, six months by action of the Judge with a jury or the larger period on a jury trial on the issue of criminal contempt." (A 10-11).

** The District Court observed:

"You were given this morning an opportunity to confer with your counsel and after conferring with counsel indicated to the Court that all these matters were clear to you and that you understood your position." (A 11).
Neither Hughey nor his attorney responded.

added). (A 13). Again Hughey refused. Again the court found his refusal was "without just cause" and directed him to answer. Finally, upon Hughey's repeated refusals to answer, Judge Pollack said:

"I accordingly adjudge the witness in contempt, and I direct that he be forthwith confined for the duration of the trial. The Government may consider whether it is prepared to and desires to proceed on the basis of obstruction of justice by this witness." (A 14).

Immediately after the contempt citation, Hughey's attorney asked for a stay to permit time to apply for bail pending appeal, tracking the civil contempt statute and noting that the Government still might decide to pursue Hughey's contumacious conduct with criminal proceedings.* Judge Pollack denied the application.**

* The first words out of counsel's mouth after the judge ordered Hughey incarcerated were:

"For the record, I am Martin Stolar, Mr. Hughey's counsel. I would ask that you stay his being remanded to custody to give me an opportunity to seek bail pending appeal—from the Second Circuit. *I understand that the statute under which you have adjudged him in contempt does not allow for [bail] in cases where the appeal is taken for delay or the appeal is frivolous.* I do not believe that the appeal is taken for delay or the appeal is frivolous.

"Mr. Hughey will, if he is not granted bail, be remanded merely for a short period of time. *If the government wishes to proceed in a criminal way, they can, after the circuit decides whether or not there is merit to the appeal.* (Emphasis added)."

The provision relating to bail and referred to by Mr. Stolar in this context, of course, is in 28 U.S.C. § 1826(b) and does not appear in any criminal contempt rule or statute.

** On the same day, September 22, 1975, Alpert was sworn as a juror in the Swinton trial outside the presence of the jury. She was granted immunity and directed by Judge Pollack to give testimony. She refused, was held in civil contempt and incarcerated for the duration of the trial.

C. Events following Hughey's appearance as a witness in the trial of *United States v. Swinton*

On September 24, 1975, Hughey's attorney filed a Notice of Appeal from Judge Pollack's order adjudging Hughey in contempt of court. The Notice explicitly acknowledged that Hughey had been adjudged in civil contempt pursuant to the civil contempt statute, "18 [sic] U.S.C. § 1826."*

Before the motion for bail could be heard, however, on September 26, 1975, the Government rested its case against Swinton, and the matter was submitted to the jury. As soon as testimony in the trial ended, Judge Pollack signed an order reciting that Hughey had been held in "civil contempt", and directing that Hughey be released forthwith, inasmuch as the "trial testimony [was] concluded". (GX 7).

On the same day, the jury acquitted Swinton on all charges in the bombing indictment.

* Similarly, counsel's affidavit in support of Hughey's motion for bail filed in this Court (GX 6), characterized what had happened in the District Court, and acknowledged that the judgment was one of civil contempt, alleging, among other things:

"Upon information and belief no amount of *coercive* incarceration will change Mr. Hughey's mind. In addition, the government may proceed against Mr. Hughey for criminal contempt after it becomes apparent that the *Civil Contempt remand* has been unavailing." p. 4 (emphasis added).

* * * * *

"The notice of appeal from the order adjudging him in *civil contempt* and ordering him confined has been filed with this Court." p. 4 (emphasis added).

Hughey's appeal from Judge Pollack's judgment of contempt was withdrawn by stipulation at Hughey's request* on November 28, 1975.

D. The proceedings before Judge Griesa

On May 21, 1976, Indictment 76 Cr. 496 (TPG) was filed charging Hughey with criminal contempt in connection with his refusal to testify at the Swinton trial.**

On August 6, 1976, Hughey moved to dismiss the criminal contempt indictment, alleging that the proceedings before Judge Pollack were in criminal contempt and that the subsequent indictment put him twice in jeopardy. On June 10, 1977, a hearing was conducted on the motion, during which Hughey was sworn but declined to testify, invoking the Fifth Amendment and the attorney-client privileges.

On July 22, 1977, after oral argument, Judge Griesa denied Hughey's motion in an oral opinion. (A 17-26). Judge Griesa found that the proceeding before Judge

* In the meantime, Hughey's attorney managed to obtain for him witness fees and travel expenses for his appearance on September 22, 1975, successfully arguing that the Government's "sole relief for the refusal [to testify] was to move via 28 U.S.C. § 1826, the provision for a recalcitrant witness which, of course, was done." (GX 8).

** On the same day, May 21, 1976, Indictment 76 Cr. 497 (TPG) was returned charging Alpert with criminal contempt in connection with her refusal to testify at the same trial. She was convicted after a non-jury trial before the Hon. Thomas P. Griesa, and on October 6, 1977, was sentenced to four months imprisonment. A Notice of Appeal was filed in her case on October 11, 1977. It is anticipated that she will raise an issue identical to that raised in the instant appeal.

Pollack was in the nature of civil contempt. Specifically, in support of his conclusion, Judge Griesa reviewed the entire record and found, *inter alia*, that Judge Pollack had designated the proceeding as in civil contempt; that he warned about possible additional future proceedings in criminal contempt; that although Judge Pollack did not expressly tell Hughey of his right to purge his contempt, it was clear from the District Court and appellate records that Hughey's attorney was aware of the nature of the proceeding and the civil contempt statute under which Judge Pollack had acted. Judge Griesa further found that Hughey was not in any way deprived of the right to purge himself of civil contempt by lack of information, and in any event, that Hughey had no interest in taking advantage of the opportunity to purge, nor did he attempt to do so.

ARGUMENT

Judge Griesa Correctly Denied Hughey's Double Jeopardy Motion.

On this appeal Hughey contends that Judge Griesa erred in his determination that the proceeding before Judge Pollack on September 22, 1975, was for civil contempt. Relying solely upon the language of Judge Pollack's oral order—removed from the context of the proceeding in which it was entered—Hughey argues that the lack of an explicit purge clause and the "for the duration of the trial" language of the confinement order, rendered the judgment one for criminal contempt, thereby barring the present prosecution on double jeopardy

grounds.* Defendant's hypertechnical argument rests on a misconception of the applicable law and conveniently permits Hughey to ignore what Judge Griesa specifically found is manifest from the entire record in this case: that the relief requested of Judge Pollack by the Government and the relief provided by the trial judge was to hold Hughey in civil contempt—a fact known to everyone in Judge Pollack's courtroom at the time, including Hughey.

In the first instance, Hughey's argument is constructed upon the erroneous premise that the language of the contempt order is dispositive of the type of contempt imposed. In fact, when the type of contempt imposed becomes a material issue, the true test is not what did the judge say (or not say) in his order of contempt, but "what [did] the court primarily seek to accomplish by imposing sentence?" *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Thus, in numerous contempt cases, the Supreme Court has looked beyond the words of the contempt order—and, indeed, beyond the record of the contempt proceeding itself—to the totality of the circumstances, in order to determine the nature of the contempt judgment. See, e.g., *Colombo v. New York*, 405 U.S. 9 (1972); *Shillitani v. United States*, *supra*; *Yates v. United States*, 355 U.S. 66 (1957); *Penfield Co. v. S.E.C.*, 330 U.S. 585 (1947); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Gompers v. Bucks Stove & Range*

* Hughey does not dispute, as he cannot, that if the September 22, 1975, judgment was for civil contempt, the present criminal contempt indictment does not place Hughey in double jeopardy. "[T]hat the same act may give rise to both sanctions presents no double jeopardy problem." *Yates v. United States*, 355 U.S. 66, 74 (1957). See also, *United States v. Marra*, 482 F.2d 1196, 1202 (2d Cir. 1973). Conversely, of course, a prosecution for criminal contempt would be barred if it had been preceded by a judgment of criminal contempt for the same act. Cf. *Colombo v. New York*, 405 U.S. 9 (1972).

Co., 221 U.S. 418 (1911)).* An analysis of the totality of the circumstances in this case** makes abundantly clear that in the September 22, 1975, proceeding before Judge Pollack, Hughey was held in civil contempt.

Against a background in which the Government's sole purpose and interest was to obtain Hughey's testimony,

* The cited cases were decided in a wide variety of procedural postures, of which only *Colombo* concerns the definition of a prior contempt as it relates to an allegation of double jeopardy. But, each decision, including *Colombo*, either explicitly or implicitly supports the proposition that all of the surrounding facts and circumstances are pertinent to the inquiry, and that no single factor is controlling. Each case can be read, in the words of Judge Learned Hand, "not as making crucial any one detail, but rather as summing up the features of a portrait which as a whole [is] plainly recognizable." *In re Guzzardi*, 74 F.2d 671, 672 (2d Cir. 1935).

Moreover, this approach readily comports with the established analysis of double jeopardy issues that requires the court "to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter . . .," to set the inquiry "in a practical frame" and to view it "with an eye to all the circumstances of the proceedings." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Cf. *United States v. Cohen*, 489 F.2d 945, 952 (2d Cir. 1973).

** Defendant states in his brief, at 18, that in the District Court the Government took the position that the nature of the contempt should be determined solely on the basis of the record before Judge Pollack. This misstates the Government's position. The Government's Affidavit dated August 31, 1976, in Opposition to Hughey's double jeopardy motion, relied in part upon matters which occurred prior to and after the contempt proceedings before Judge Pollack. Thus, the Government never agreed that Judge Griesa's decision should be based solely on the record before Judge Pollack, much less solely on the basis of the oral contempt order. The Government merely agreed that a hearing to determine whether or not Hughey actually knew he had a right to purge himself of contempt was not necessary because, in the Government's view, Hughey's knowledge was not dispositive of the issue. See *infra*, at 19.

not to seek his punishment,* a fair reading of the record of the proceeding demonstrates that Judge Pollack's limited goal was to force Hughey's testimony, if possible. Thus, at all stages of the proceeding, Judge Pollack carefully advised Hughey—in terms certainly unmistakable to his experienced and highly competent counsel—of the separate and distinct civil and criminal sanctions that could flow from his continued refusal to answer questions. In each instance, Judge Pollack made clear that while a civil contempt sanction could mean immediate imprisonment, although for a duration not to exceed the trial, criminal contempt would require some further action on the part of the Government, and would mean exposure to a much longer period of imprisonment. Moreover, Judge Pollack assured that Hughey conferred fully with his retained counsel and afforded the witness multiple opportunities to avoid a contempt citation by giving the required testimony. When Hughey persisted in his refusal to answer, Judge Pollack, in directing that he testify, tracked the separate and distinct “without just cause” language of the civil contempt statute. Finally, upon ordering Hughey's incarceration for the duration of the trial, the district judge, at the same time, expressly invited the Government to consider whether it wanted to proceed against the witness in criminal contempt.

The logical and necessary conclusion from these warnings and statements was that Judge Pollack wisely proceeded to use “the least possible power adequate to the

* Hughey, of course, had pleaded guilty to the conspiracy charge in the original bombing indictment. (GX 1). Accordingly there was no doubt that he had testimony particularly relevant to the trial of defendant Swinton on the same indictment. The significance placed upon Hughey's testimony by the Government naturally was emphasized both to Judge Pollack and to Hughey in the application for immunity, which recited that in the judgment of the United States Attorney, Hughey's testimony was considered necessary to the public interest.

end proposed," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821); here, to compel Hughey's testimony by the coercion of incarceration.* Thus, the experienced trial judge merely was proceeding to make good on the promised sanctions, of which Hughey had been advised, in the appropriate order of severity. Indeed, if the citation had been in criminal contempt, the invitation to the prosecutor for further action would have been meaningless, and the earlier repeated distinctions between civil and criminal contempt unnecessary.

Hughey's counsel—who is the same counsel representing defendant on this appeal—also demonstrated his clear understanding that Judge Pollack had proceeded with civil contempt. Immediately after Judge Pollack imposed sentence, Mr. Stolar sought bail relief expressly available under the *civil* contempt statute, and in all of Hughey's papers filed in this Court on the appeal from the judgment, referred to the contempt as "civil contempt".** See *supra*, at 7-8; (GX 5, GX 6). *

Notwithstanding the plain impact of this record which shows all participants—including Hughey's counsel—proceeding with the knowledge that Judge Pollack had imposed a civil contempt sentence, defendant now argues that the contempt must be viewed as criminal because the sentence was for a fixed period, and Judge Pollack never advised Hughey of the right to purge himself of contempt. These claims do not withstand analysis and do not compel the conclusion Hughey asks this Court to reach.

First, Judge Pollack earlier had correctly advised Hughey that his failure to testify could result in civil con-

* See, e.g., *Shillitani v. United States*, *supra*, 384 U.S. at 371-72; *Yates v. United States*, *supra*, 355 U.S. at 75; *United States v. Marra*, *supra*, 482 F.2d at 1202.

** As noted earlier, Hughey's appeal from Judge Pollack's civil contempt order was later withdrawn. See *supra*, at 9.

tempt and his imprisonment for "the duration of the trial" (A 10-11), a limitation specifically inherent in civil contempt, *Shillitani v. United States*, *supra*, 384 U.S. at 371-72; 28 U.S.C. §1826(a) (1), (2). The sentence thereafter imposed by Judge Pollack was not definite. It lasted the duration of the trial only by reason of Hughey's refusal to purge himself and to testify. Indeed, as soon as testimony in the trial was concluded, but *before* jury deliberations and the resultant verdict of acquittal which marked the *end* of the trial, Judge Pollack properly ordered Hughey released, recognizing that the court's civil contempt power had expired since Hughey no longer could purge himself. *Shillitani v. United States*, *supra*, 384 U.S. at 371. Thus, the sentence simply was not inconsistent with the trial judge's purpose to coerce the witness' testimony, and does not alter the conclusion that civil contempt was imposed.*

* Moreover whether or not a sentence appears on its face to be determinate is not controlling of the classification of the contempt as "civil" or "criminal". Thus, for example, in *Shillitani*, *supra*, the Supreme Court found the proceedings—which related to a witness' refusal to testify before a grand jury—to be in civil contempt, notwithstanding a determinate sentence of two-year's imprisonment, which, on its face, exceeded the length of time that possibly could have been imposed for civil contempt in those circumstances. See also, *United States v. Yanagita*, 418 F. Supp. 214, 217 (E.D.N.Y. 1976), *rev'd on other grounds*, 552 F.2d 940 (2d Cir. 1977). Nor is *United States v. Hall*, 176 F.2d 163 (2d Cir.), *cert. denied*, 338 U.S. 851 (1949), not cited in Hughey's brief, to the contrary. In *Hall*, this Court found that a sentence "for the duration of the trial" was sufficiently definite to support a judgment of criminal contempt, imposed to punish defendants for disruptive behavior during trial. *Hall*, of course, clearly is distinguishable from the present case, since the trial judge there specifically found defendants in criminal contempt, filed the required certificate under Fed. R. Crim. P. 42(a), and this Court concluded that there was an unquestionable obstruction of the orderly proceedings by defendants' disruptive conduct. Finally, and most significantly, *Hall* arose in

[Footnote continued on following page]

Similarly, the absence of an express statement by the District Court of Hughey's right to purge himself does not convert this otherwise clear civil contempt into criminal contempt. It is the purpose of the contempt order, not the absence or presence of any one factor, that is determinative of the nature of the contempt imposed. Thus, the overall characteristic of civil contempt is the remedial, coercive aspect of a sentence which has been imposed for refusing to do something which has been ordered, *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at 442. Moreover, civil contempt is intended to operate prospectively, for the benefit of the complainant—the Government in this case—*Shillitani v. United States*, *supra*, 384 U.S. at 370, where there is a continuing necessity for a response, and an ability to give it. Cf. *Cheff v. Schnackenberg*, 384 U.S. 373, 377 (1966).^{*} While a

the narrow context of determining whether the sentences imposed were unlawful as being indefinite. On this precise issue, the Court noted that the sentences revealed "with fair certainty the intent of the court and exclude[d] any serious misapprehensions by those who must execute them," and that "[t]he elimination of every possible doubt cannot be demanded." *Id.* at 168. The same principle, applied on all the facts of this case, can only lead to the conclusion that Hughey's sentence was "indefinite" enough to support a judgment in civil contempt.

^{*} The overall characteristic of criminal contempt, on the other hand, is the purely punitive aspect of a sentence imposed for doing something prohibited by law, *Gompers v. Buck Stove & Range Co.*, *supra*, 221 U.S. at 442. It is intended to vindicate the authority of the court, *id.* at 441, and for deterrence, *Yates v. United States*, *supra*, 355 U.S. at 74, where there is no ability in the contemnor to comply with the order prospectively. *Cheff v. Schnackenberg*, *supra*, 384 U.S. at 377.

No where in the record of the proceeding involving Hughey did Judge Pollack show the slightest inclination to sentence Hughey in vindication of the court's authority, or to deter others. Nor is there any other indication of an intent to impose criminal contempt in the record. For instance, no written certificate of contempt, as required by Fed. R. Crim. P. 42(a) for summary criminal contempt, was even discussed by Judge Pollack, or anyone else, nor was any such certificate filed by the court.

clear expression of the purge right is a significant indication of a coercive purpose, the absence of such an explicit expression does not undermine an otherwise apparent coercive purpose.*

There can be no question here, based upon the totality of the circumstances—including the Government's application for relief, the trial court's earlier warnings, the acknowledgement by Hughey's counsel that the proceeding was in civil contempt, and Judge Pollack's order that released Hughey after testimony had been concluded—that had Hughey desired to purge himself earlier by testifying, the trial judge and the Government plainly

* We are aware, of course, of language in *Baker v. Eisenstadt*, 456 F.2d 382, 387 (1st Cir.), *cert denied*, 409 U.S. 846 (1972), which suggests that an essential ingredient of a sanction for civil contempt is an explicit condition to release contemnor if he is willing to testify. However, it is clear from a full reading of the decision that, despite this language, the Court's finding of criminal contempt was not based solely on the lack of a purge clause in the judgment, but on a whole host of factors which distinguish it from Hughey's case. First, the trial judge who imposed the contempt in *Baker* specifically rejected counsel's claim that the judgment was in civil contempt and that the defendant could purge himself. Second, the sentence in *Baker* was a flat five months. These factors were clear indications that the trial judge's purpose was to punish. Third, the issue raised in *Baker* was entirely different from that presented here by Hughey, and the *Baker* Court's language can properly be viewed in this context as no more than dicta. The defendant in *Baker* argued that because the contempt procedures had been summary, he could not have been lawfully held in criminal contempt under *Harris v. United States*, 382 U.S. 162 (1965). The *Baker* Court held that such procedures were proper, a proposition later rejected by the Second Circuit Court of Appeals in *United States v. Marra*, *supra*, 482 F.2d at 1201, but subsequently upheld in *United States v. Wilson*, 421 U.S. 309 (1975).

In sum, the *Baker* Court only found that on the record and posture of that case, it could not construe the sentence imposed as designed to coerce testimony.

would have welcomed that occasion to cure his contempt.* And, in the face of the Government's substantial need for Hughey's testimony in this important case, it is apparent that Judge Pollack's purpose in imposing a limited civil contempt sentence was to provide every assistance within the power of the court to compel Hughey to give evidence. *Penfield Co. v. S.E.C.*, *supra*, 330 U.S. at 590; *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). While, as Judge Griesa found, it clearly was likely that the civil contempt sanction would not be successful—a matter that may have accounted for Judge Pollack's inadvertent failure to make mention of the purge right—it is also plain that the trial judge was justified in making the effort to compel Hughey's testimony through civil contempt with the knowledge that, as often happens, reluctant witnesses do change their minds about testifying when confronted with incarceration. *United States v. Sanchez*, *supra*, 459 F.2d at 103 (quoting Pollack, D.J.). In sum, in the circumstances of this case—where the great public interest in a full exposition of the facts underlying a serious and violent crime was thwarted by Hughey's contumacious refusal to testify—the suggestion is absurd that the experienced trial judge would have foregone the available coercive remedies of civil contempt to impose a relatively modest prison sentence for criminal contempt, without any further explanation of his reasons.**

* Cf. *Colombo v. New York*, *supra*, where the Supreme Court considered highly pertinent on the question of the nature of the contempt, the refusal of the prosecutor and the trial judge to accept defendant's subsequent offer to testify as sufficient to foreclose the execution of the contempt sentence.

** Moreover, a review of the proceeding plainly shows that Judge Pollack was following this Court's earlier suggested procedures in *United States v. Marra*, *supra*, 482 F.2d at 1202, which called first for the imposition of civil contempt sanctions, in an

[Footnote continued on following page]

Finally, Hughey's argument based on the lack of an explicit purge clause is rendered wholly specious and totally without merit on this record by the plain fact that Hughey knew he could purge his contempt by giving testimony.* Indeed, Hughey has never claimed that he did not know of his right to purge.** Moreover, the record persuasively demonstrates that Hughey was well-informed by his attorney of the legal ramifications of his recalcitrance, during and after the proceeding in Judge Pollack's courtroom.

It is manifest, as Judge Griesa found, that the nature of the proceeding was crystal clear to Hughey's experienced and knowledgeable attorney, see *supra*, at 7-10. Judge Pollock, as he was entitled to, relied repeatedly on Mr. Stolar to advise Hughey, in detail, of the consequences of his course of action. On several occasions the busy trial judge halted proceedings to permit Hughey and his

effort to achieve testimony, and later criminal sanctions if the witness remained recalcitrant. Only this interpretation of the record explains Judge Pollack's contemporaneous invitation to the prosecutor to consider proceeding with criminal contempt charges in the future. (A 14).

* The Government adheres to its position that Hughey's knowledge of the right to purge is not dispositive of the issue here, a principle which follows from the settled rule that it is the purpose of the sentence that controls the definition of the type of contempt imposed. If this were not so, any witness could remain silent when civil contempt was imposed and later seek to redefine the judgment for double jeopardy purposes by claiming that he didn't know, didn't hear, or didn't understand his right to purge. On the other hand, of course, Hughey's awareness that he could cure his contempt is one more indication of the civil nature of Judge Pollack's contempt judgment.

** On June 10, 1977, Judge Griesa convened an evidentiary hearing to determine the extent of Hughey's actual knowledge. Hughey took the witness stand, but declined to testify, invoking his Fifth Amendment privilege against self-incrimination and the attorney-client privilege.

attorney to confer, opportunities of which they took advantage. Judge Pollack further gave Hughey and his counsel the chance to clarify any matters or to raise any source of confusion. Both, however, reported that they understood the proceedings and entertained no confusion or doubts.* The entirely warranted inference on this record is that Mr. Stolar advised Hughey of his right to purge the contempt, as Judge Pollack properly relied on him to do, and as counsel's independent responsibility to his incarcerated client required in any event. Indeed, it defies common sense to conclude otherwise. Thus, on this record, there can be little doubt that Hughey had actual knowledge of the civil nature of the proceeding against him, including his right to purge. See, *United States v.*

* In Hughey's alternative theory, set forth in Point II of his brief, he attempts to argue—for the first time—that the record before Judge Pollack was ambiguous and confusing as a matter of law, and therefore, should be resolved in his favor. This argument is disingenuous in the extreme, for a number of reasons, not the least of which is that it is being made by the same attorney who was unquestionably certain of the civil nature of Judge Pollack's order at the time it was imposed.

Further, there is no principle in law which holds that an ambiguity in the record relating to a prior judgment and a double jeopardy claim should be resolved in favor of a defendant. Indeed, in matters related to double jeopardy claims, the burden is on the defendant. Cf. *United States v. Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); *United States v. Friedland*, 391 U.S. 378, 382 (2d Cir. 1968), cert. denied, 404 U.S. 914 (1971).

In any event, the proceeding before Judge Pollack was not confusing in any material way. To the extent that Hughey now claims the District Court's oral order was ambiguous, it was Hughey and his attorney who chose to leave it that way. Certainly no case cited by the defendant stands for the proposition that self-imposed or proclaimed confusion should be construed against the Government in a double jeopardy context.

Mine Workers, supra, 330 U.S. at 297; *United States v. Handler*, 476 F.2d 709, 712-13 (2d Cir. 1973).*

In sum, Judge Griesa properly and carefully reviewed the entire record here in a realistic and practical light. The District Court's conclusion that Judge Pollack's judgment was for civil contempt was clearly justified and fully supported by the record. Thus, Judge Griesa correctly denied Hughey's double jeopardy motion to dismiss the criminal contempt indictment.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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* It is more than arguable that even without this clear record of Hughey's actual knowledge, he would have been bound by his attorney's awareness. See, e.g., *Wainwright v. Sykes*, 97 S. Ct. 2497, 2508 (1977); *Estelle v. Williams*, 425 U.S. 501, 512 (1976); *Ennis v. LeVre*, Docket No. 76-2155, slip op. 5205, 5211-12 (2d Cir., Aug. 9, 1977); *United States v. O'Looney*, 544 F.2d 385, 392 n. 5 (9th Cir. 1976), *cert denied*, 97 S. Ct. 692 (1977).

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

To ANN HARRIS being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District of
New York.

2
Copies
JH

That on the 18th day of October 1977
She served ~~a copy~~ of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

MARTIN STOLAR, Esq.
Stolar, Alterman & Gulichmetti
Attorneys at Law
350 Broadway, Suite 1207
N.Y., N.Y. 10013

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing at the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

John Harris

Sworn to before me this

18th day of OCTOBER, 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

